(1)

Supreme Court

93 2021 JUN 13 1994

NO. _____

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALABAMA,

PETITIONER - APPELLEE,

V.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[28 U.S.C. §2254 PROCEEDINGS]

# PETITION FOR WRIT OF CERTIORARI

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22 pp

## QUESTIONS PRESENTED FOR REVIEW

I. In light of Brown v. Allen, 344 U.S. 443 (1953) and Coleman v. Thompson, 501 U.S. 722 (1991), both of which imply that the time and manner for perfecting an appeal from conviction is a question of state law, did the Court of Appeals for the Eleventh Circuit exceed the scope of habeas corpus in holding that Respondent could have his claims heard in federal habeas corpus in an instance where the Respondent had lost the right to have his claims heard on appeal in state court due to the refusal of the Alabama Court of Criminal Appelas to reinstate his notice of appeal which had been knowingly and voluntarily withdrawn by a motion filed in that court?

II. Where the Respondent sought to be excused from procedural default in state court on the theory that the state court did not follow a "firmly established and regularly followed state practice" in denying his motion

to reinstate his notice of appeal, did the Respondent satisfy his burden of proof merely by showing that no state appellate rule nor any reported case decision contained any provision disallowing a reinstatement, but failed to show that the Alabama Court of Criminal Appeals had arbitrarily exercised its inherent authority to grant reinstatement to other defendants while denying reinstatement to Respondent?

## THE PARTIES

The caption contains the names of all the parties to the proceedings in the court below.

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## OPINIONS BELOW

1. The original opinion of the United States Circuit Court of Appeals for the Eleventh Circuit reversing the decision of the District Court and the granting of the writ is non-published. It is contained in Appendix "A".

The Recommendation of the Magistrate Judge and the Order of the District Court are contained in the attached Appendix "B".

## JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit which is sought to be reviewed was rendered on March 14, 1994. This Court has jurisdiction under 28 U.S.C. §1254(1), as amended (by Public law 100-352) on June 27, 1988.

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V (in pertinent part)

"No person ... shall be deprived of life, liberty or property, without due process of law"

made applicable to the states through the XIV Amendment to the Constitution of the United States.

Amendment XIV (in pertinent part):

"Nor shall any state ... deny to any person within its jurisdiction the equal protection of the laws".

## STATUTORY PROVISIONS INVOLVED

Rule 42, Alabama Rules of Appellate Procedure (1975 as amended)

Appendix "C"

Rule 4(b)(1), Alabama Rules of Appellate Procedure (1975 as amended)

Appendix "D"

## STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

### A. PROCEEDINGS BELOW

Respondent, Charles Hansbrough was indicted by the October 1989 Session of the Grand Jury of Jefferson County for attempted theft first degree in violation of §13A-8-3, Code of Alabama

(1975) and for possession of forgery devices in violation of §13A-9-9, Code of Alabama (1975). The Honorable William K. Delgrosso was appointed to represent Respondent. However, Respondent and his wife, who was also charged, decided to represent themselves. Respondent's case came up for trial on February 27, 1990 and on that same day, Respondents was convicted as charged in the indictments. He was pronounced guilty on March 2, 1990, and on April 20, 1990, he was sentenced to twenty (20) years on each conviction with the sentences to run concurrent.

Respondent gave oral notice of appeal after his sentencing on April 20, 1990.

The Petitioners adopt the procedural history of Respondent's state appellate proceedings as contained in the Magistrate-Judge's report and recommendation (R1-25-2-4) to wit:

> "After giving oral notice of appeal on April 20, 1990, as authorized by Rule 3(a)(2) of the Alabama Rules of Appellate Procedure, petitioner filed three post-conviction motions. Identified as "Motion for New Trial - A," "Motion for New Trial - B," and

"Motion for Judgment of Acquittal," all filed on May 17, 1990, only the "Motion for New Trial - B" is pertinent to the issues now asserted in the instant habeas action. Although "Motion for Judgment of Acquittal" apparently was not ruled upon, both motions for new trial were denied by the trial court on May 22, 1990.

While petitioner's case was pending on direct appeal, he discovered the trial court had appointed his stand-by counsel to represent him on appeal. Not wanting to be represented by counsel and wishing to pursue his appeal pro se, he filed a motion to withdraw his oral notice of appeal on June 8, 1990. Thereafter, on June 15, 1990, the Alabama Court of Criminal Appeals dismissed the appeal "on motion by appellant...." Thirteen days later, on June 28, 1990, petitioner filed his written "Pro Se Notice of Appeal." In that notice, petitioner expressly stated that he had withdrawn his oral notice of appeal because an attorney was erroneously listed as his counsel of record on appeal. Furthermore, petitioner stated that he wanted to appeal from the court's judgment of conviction on March 2, 1990, the denial of his motions for new trial on May 22, 1990, and other motions set out in the notice. On July 18, 1990, however, the Alabama Court of Criminal Appeals entered an order that "said appeal be and stand stricken in this court below."

On August 27, 1990, once again the petitioner filed a "Pro Se Notice of Appeal" purporting to appeal from the

> judgment of conviction, the sentencing order, and the denial of his Motion for Judgment of Acquittal. But, once again, on November 2, 1990, the Alabama Court of Criminal Appeals entered an order dismissing the appeal "as [un]timely filed."

On July 25, 1991, the Magistrate-Judge entered a Report and Recommendation that the petition be denied on the ground that Respondent had procedurally defaulted in state court by dismissing his notice of appeal.

The District Court entered an order on September 12, 1991, adopting the Report and Recommendation (R-1-25).

The Court of Appeals for the Eleventh Circuit grant a certificate of probable cause on June 19, 1992 (R. 1-31).

On January 7, 1994, the Court of Appeals for the Eleventh Circuit affirmed the district court's finding that Respondent had committed a procedural default. Nevertheless, the Eleventh Circuit reversed the district court's dismissal of the petition, holding that since the Alabama Rules of Appellate Procedure contained no

provision regarding the reinstatement of notice of appeals and since there were no reported state cases which hold that a voluntary dismissal of an appeal is with prejudice so as to bar a subsequent appeal, the refusal of hte Alabama Court of Criminal Appeals to accept the subsequent notice of appeal was not sufficient as an adequate and independent state ground to preclude federal habeas relief because the state court's ruling was not made pursuant to a "firmly established and regularly followed state practice".

On March 14, 1994, the Eleventh Circuit denied Respondent's Motion for Rehearing.

## REASON FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WHICH ALLOWS THE RESPONDENT TO HAVE HIS CLAIMS HEARD ON THE MERITS IN HABEAS RELIEF EVEN THOUGH THE STATE COURT HAD REFUSED TO HEAR THE CLAIMS IN AN APPEAL BECAUSE PETITIONER HAD PREVIOUSLY WITHDRAWN HIS NOTICE OF APPEAL. SINCE THE TIME AND MANNER OF PERFECTING AN APPEAL IS STRICTLY A STATE LAW QUESTION, AND DOES NOT INVOLVE ANY FEDERAL CONSTITUTIONAL QUESTION, THE RESPONDENT IS NOT ENTITLED TO FEDERAL HABEAS REVIEW OF THE STATE COURT'S DECISION TO DENY HIS MOTION TO REINSTATE HIS APPEAL.

This Petition for Certiorari raises the plain issue of whether the time and manner of perfecting an appeal from a state court conviction constitutes a question of state law which cannot be reviewed in federal habeas corpus, or a question of federal constitutional law which could be reviewed in a federal habeas petition. At the heart of this petition is the question of whether a defendant has a federal constitutional right to reinstate a timely given notice of appeal that had been voluntarily and

knowingly withdrawn for devious, tactical reasons.

By granting Respondent the right to proceed in federal habeas corpus despite the state court's refusal to entertain his appeal due to the motion to withdraw, the Eleventh Circuit implicitly holds that question of whether a defendant has properly perfected an appeal from conviction is a federal constitutional question and that the failure to perfect an appeal due to procedural default can be excused for good cause.

This holding by the Eleventh Circuit is seemingly in conflict with Brown v. Allen, 344 U.S. 443 (1953) and Coleman v. Thompson, 501 U.S. 722 (1991). In Brown, this Court treated the defendant's failure to file his statement of the case within the time required by the state appellate as an issue of state law and this Court refused to review the state court's decision in a writ of certiorari. In pertinent part, the court in Brown stated:

> "After the refusal of the first coram nobis petition, the Supreme Court of North Carolina dismissed

petitioners' attempted appeal on the record proper on the ground that no case on appeal had been filed....

The failure to perfect the appeal came in this way. Upon the coming in of the verdict on June 6, 1949, the petitioners several times moved for a new trial, in each motion reiterating one or the other of the aforementioned federal questions. These motions were denied, and the trial court pronounced its sentence. Petitioners excepted to the judgments and noted appeals therefrom to the State Supreme Court. In response to petitioners' notice, the trial judge granted petitioners 60 days in which to make and serve a statement of the case on appeal. When counsel failed to serve this statement until 61 days had expired, the trial judge struck the appeal as out of time. This action precluded an appeal as of right to the State Supreme Court....

....Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds.

North Carolina has applied its law in refusing this out-of-time review. This Court applies its jurisdictional statute in the same manner. Preston v. Texas, 343 US 917, 933, 96 L ed 1331, 72 S Ct 649; cf. Paonessa v. New York, No. 133 Misc, this Term, certiorari denied October 20, 1952 [344 US 860, post, 667, 73 S Ct 99], because "application therefor was not

> made within the time provided by law." We cannot say that North Carolina's action in refusing review after failure to perfect the case on appeal violates the Federal Constitution. A period of limitation accords with out conception of proper procedure." [Emphasis Added]

Id at 484, 485, 486.

Because Brown is clear on the question that rules regarding perfection of an appeal from a state court conviction is strictly an issue of state law, the Eleventh Circuit exceeded the scope of federal habeas corpus in this case by granting Respondent the right to seek habeas relief even though the state court has refused to accept his subsequent motion for notice of appeal on the ground that it was "untimely." The Eleventh Circuit should have affirmed the district court's denial of habeas relief upon the ground that it had no authority to grant relief on this petition.

In Coleman v. Thompson, the Court refused to review the Virginia Supreme Court's dismissal of defendant's appeal because the dismissal had been based upon the defendant's failure to file

a timely notice of appeal. The Court held that the state's appellate rules were based "primarily on state law," and the Court declined to review the habeas claims on the merits becuase the untimely notice of appeal constituted a procedural default under state law.

As in Brown and Coleman, where the state courts had held that the defendants had untimely failed to appeal, the Alabama Court of Criminal Appeals held that Respondent's subsequent notice of appeal was "untimely". Since the timeliness of an appeal is governed only by an interpretation of the state appellate rules, no question of federal constitutional dimension was presented to the Eleventh Circuit and thus the granting of the right to proceed in habeas corpus was clearly error.

(B)

NOTHING IN THE ALABAMA RULES OF APPELLATE PROCEDURE LED PETITIONER TO BELIEVE THAT HE COULD REINSTATE A DISMISSED NOTICE OF APPEAL.

It should be noted that Petitioner was not misled into believing that he could revive a dismissed appeal. No action of the state or any reasonable interpretation of the rules of appellate procedure gave Respondent reason to believe that a subsequent notice of appeal could be given at a later date. Respondent was motivated by his own devious reasons -- to avoid representation by counsel who had been appointed to prosecute the appeal -- in dismissing the appeal. This is clearly a factor that should weigh against him in deciding whether he had a constitutional right to reinstate his appeal.

(C)

THE QUESTION OF WHETHER A CRIMINAL DEFENDANT HAS A CONSTITUTIONAL RIGHT TO REINSTATE A VALID NOTICE OF APPEAL WHICH HAD BEEN VOLUNTARILY DISMISSED IS AN IMPORTANT QUESTION WHICH HAS YET TO BE DECIDED BY THIS COURT.

Although this Court has already decided that a criminal defendant has an equal protection and due process right to an appeal if the State allows appeals for other defendants, Griffin v. Illinois, 351 U.S. 12 (1956), this Court has never decided whether a criminal defendant, who gives a valid notice of appeal within the time allotted by state law, and then voluntarily withdraws the notice of appeal, is constitutionally entitled to have his notice of appeal reinstated. Respondent requests that the Court grant certiorari so that this issue can be fully briefed.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE IF A STATE COURT'S RULING MUST BE MADE PURSUANT TO A WRITTEN PROCEDURAL RULE OR BASED UPON A PRIOR CASE DECISION IN ORDER FOR THE RULING TO BE CONSIDERED A "FIRMLY ESTABLISHED AND REGULARLY FOLLOWED STATE PRACTICE."

As a basis for its decision that Respondent should be permitted to have his habeas corpus claims heard on the merits, the Eleventh Circuit held that the state court's denial of the right to reinstate the appeal was not based upon a "firmly established and regularly followed state practice" as required by Ford v. Georgia, 498 U.S. 411 (1991), and thus, the state court's ruling would not constitute an adequate and independent state ground to bar federal habeas relief. The Eleventh Circuit held that it would not be adequate because the state court's ruling was based upon a "novel procedural requirement" and that there was nothing in the state appellate or criminal rules that hold that a voluntary dismissal of an appeal would bar a second appeal.

This ruling by the Eleventh Circuit clearly misapplies the "firmly established and regularly followed" requirement. In the cases decided by this Court, that term was applied to situations where a state court had either applied a state procedural rule in an "irregular, arbitrary, or inconsistent manner", Swaggart v. California Equalization Bd., 493 U.S. 378 (1990), had applied a new procedural rule to a case pending on appeal where the rule was not in effect during the trial, Ford v. Georgia, 498 U.S. 411 (1991), or had failed to clearly and consistently adhered to procedural distinction between "admonitions and instructions". James v. Kentucky, 466 U.S. 341 (1984). In each instance, this Court made a finding that the procedural ruling would not be honored because the procedural rule had been applied inconsistently or unfairly.

To the contrary in the present case, the Eleventh Circuit did not find that the Alabama Court of Criminal Appeals had arbitrarily denied Respondent the right to re-instate his appeal or

arbitrarily declined to accept his subsequent notices of appeal. The Eleventh Circuit made no finding that the Alabama Court of Criminal Appeals allowed defendants other than Respondent to re-instate their appeals.

Furthermore, the Eleventh Circuit erroneously held that the state court's ruling was "novel" or "arbitrary" merely because there was no evidence of how the Alabama Court of Criminal Appeals had ruled in other situations. This reasoning is faulty because it was never shown that the court ever had to make this ruling in any other case. This ruling by the Eleventh Circuit is in error and conflicts with the rulings of this Court which clearly require that a state court's application of a procedural rule be inconsistently applied before a federal habeas court can disregard the procedural default and entertain habeas claims.

## CONCLUSION

It is obvious that the Eleventh Circuit Court of Appeals has misapplied habeas corpus

law as stated by this Court. The Eleventh Circuit, first, wrongly treated the State's refusal to accept Respondent's subsequent notice of appeal after he had withdrawn his first as a federal constitutional issue rather than as a state law issue.

Secondly, the Court misapplied the "firmly and established and regularly followed" rule because it never found that the state court arbitrarily or inconsistently denied Respondent the right to reinstate his of notice of appeal or accept a subsequent notice. The Court should review and correct the Eleventh Circuit's misapplication of Ford v. Georgia to the facts of this case.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY-

James B. Prude

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

6446I

Supreme Court, U.S.
FILED

(2)

93 2021 JUN 13 1994

OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALABAMA,

PETITIONER - APPELLEE,

V.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

# APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX "A"

HANSBROUGH V. LATTA

Charles HANSBROUGH, Petitioner-Appellant,

v.

Sherrell Wayne LATTA, Jailer, Attorney General of the State of Alabama,

Respondents-Appellees.

No. 91-7735.

United States Court of Appeals,
Eleventh Circuit.

Jan. 7, 1994.

Petitioner sought habeas corpus review after the Alabama Court of Criminal Appeals struck his second notice of appeal without explanation. The United States District Court for the Northern District of Alabama, No. 90-CV-695, Clarence W. Algood, J., dismissed writ of habeas corpus as procedurally barred, and appeal was taken. The Court of Appeals, Dyer, Senior Circuit Judge, held that state court's striking notice of appeal was not based on established state procedural rule, and thus, action seeking federal habeas review could not be dismissed as procedurally barred.

Reversed and remanded.

1. **Habeas Corpus Key 842**

Whether petitioner's actions have created state law procedural bar to federal habeas review is mixed question of law and fact which is reviewed de novo.

2. **Habeas Corpus Key 422**

Even if plain statement of why state court appeal was stricken is lacking, federal court should not address habeas corpus petition unless it "fairly appears" that state court's decision rested primarily on federal law or was interwoven with that law.

3. **Criminal Law Key 1131(1)**

Alabama law does not contain rule that voluntary dismissal of appeal is with prejudice so as to bar subsequent appeal.

4. **Criminal Law Key 1083**

Under Alabama law, there is no requirement that posttrial motions have no tolling effect if a notice of appeal has already been filed when motions are denied.

5. **Habeas Corpus Key 403**

Only firmly established and regularly followed state practice may be interposed by state to prevent subsequent review by federal court of federal constitutional claims.

6. **Habeas Corpus Key 403**

Novel state procedural requirements or those of whose existence defendant could not reasonably be deemed to have been apprised could not prevent review of cases seeking vindication in state courts of federal constitutional rights.

7. **Habeas Corpus Key 403**

Absent anything in Alabama's appellate or criminal rules which could reasonably have apprised defendant that dismissal of his orally noticed appeal and refiling as provided by Rule would or even might be untimely or constitute waiver of right to appeal, action seeking federal habeas review could not be dismissed as procedurally barred; striking of notice of appeal by state court was not grounded on any firmly established procedural rule.

**8. Criminal Law Key 1081(4.1)**

Fact that defendant filed notice of appeal in Alabama state court prior to filing his postsentencing motions did not affect treatment of premotion notice of appeal as having been filed on date notice is denied. Rules App.Proc., Rule 4(b)(1).

---

Appeal from the United States District Court for the Northern District of Alabama.

Before KRAVITCH and BLACK, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

Hansbrough's Petition for Writ of Habeas Corpus was dismissed by the district court as procedurally barred. In the state court he attempted to raise federal constitutional issues, for example, that he was denied Brady material and that a search and seizure was illegal.

The issue before us is whether the action of the state court in striking Hansbrough's notice of appeal rests upon an independent and adequate state procedural rule that is firmly established and regularly followed, so as to deprive him of an opportunity for federal review on the merits. We find that he is entitled to such a review, and reverse.

Procedural History

Hansbrough was convicted in an Alabama state court for attempted theft first degree and for possession of forgery devices, and was sentenced to 20 years on each charge to run concurrently. He filed a timely oral notice of appeal on April 20, 1990 as authorized by Ala.R.App.P. 3(a)(2). On May 17, 1990 he filed a motion for a new trial. This motion was denied by the trial court on May 22, 1990, while Hansbrough's direct appeal was pending. He withdrew the oral notice of appeal on June 8, 1990 because he discovered that the trial court had appointed unwanted counsel and he wished to

proceed pro se. Thereafter, on June 15, 1990 the Alabama Court of Criminal Appeals dismissed his oral notice of appeal. On June 28, 1990 Hansbrough filed a written pro se notice of appeal which was within 42 days after denial of his timely-filed motion for new trial as provided by Ala.R.App.P. 4(b)(1)[1] , but more than 42 days of the date of sentencing. In this notice he stated that he wanted to appeal from the court's judgment of conviction on March 2, 1990 and the denial of his motion for a new trial on May 22, 1990. On July 8, 1990, the

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[1]Rule 4. Appeal As of Right - When Taken

(b) Appeals in Criminal Cases.

(1) Circuit Court. In a criminal case a notice of appeal by the defendant shall be filed with the clerk of the trial court within 42 days (6 weeks) after pronouncement of the sentence, provided that the notice of appeal may be oral, as provided in Rule 3(a)(2) ... If a motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal has been filed within 30 days from pronouncement of the sentence, an appeal may be taken within 42 days (6 weeks) after the denial or overruling of the motion....

Alabama Court of Criminal Appeals "struck" the second notice of appeal without opinion or further explanation. The district court concluded that the state court proceedings constituted a procedural default precluding federal habeas review on the merits.

In the Report of the Magistrate Judge adopted by the district court, it was stated that:

> It is not clear whether the court viewed the second appeal as being barred by the dismissal of the first or as being untimely; either is a possibility. In either event it is apparent that the Alabama Court of Criminal Appeals viewed the written notice of appeal filed June 27, 1990, to be insufficient to invoke its appellate jurisdiction to review the merits of the petitioner's appeal.
>
> The combination of the petitioner's dismissal of his first appeal and the striking of his second appeal constitutes an independent and adequate state ground precluding consideration of the merits of the habeas claims now before the court.

## Analysis

Hansbrough's notice of appeal filed after the denial of his motion for new trial would have been deemed timely, absent the earlier oral notice. The state argues that the withdrawal acted as a bar to his subsequent appeal. It further contends that the filing of a motion for a new trial tolls the running of the 42-day limit only if the notice of appeal is given after the motion is filed, but has no tolling effect if the notice of appeal is given prior to the filing of the new trial motion. When Hansbrough withdrew his oral notice of appeal, the state argues that his notice became "vacated ab initio," and the time limit for any subsequent notice of appeal would be calculated from the date of sentencing, which was more than 42 days before he filed his second notice of appeal. Thus the dismissal of the original notice of appeal constituted a procedural default of the claim he raises in his habeas petition under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Hansbrough argues that the state action must rest on independent and adequate state procedural grounds. In order to be "independent", the rule may not be intertwined with an interpretation of federal law; the state court must have relied on a state rule sufficient to justify its decision. In order to be "adequate", the rule must not be applied in an arbitrary or unprecedented fashion. He contends that the Alabama Court of Criminal Appeals relied on a novel procedural requirement which he could not have reasonably known about.

[1] Whether a petitioner's actions have created a state law procedural bar is a mixed question of law and fact, which this Court reviews de novo. Tower v. Phillips, 7 F.3d 206, 208 (11th Cir. 19930.

[2] The record does not contain a "plain statement" of why Hansbrough's second notice of appeal was stricken. See Harmon v. Barton, 894 F.2d 1268, 1271 (11th Cir.), cert. denied, 498

U.S. 832, 111 S.Ct. 96, 112 L.Ed.2d 68 (1990). Even if a plain statement is lacking, a federal court should not address the claim unless it "fairly appears" that the state court's decision "rested primarily on federal law or was interwoven with such law". Coleman v. Thompson, 501 U.S. ___, ___, 111 S.Ct. 2546, 2559, 115 L.Ed.2d 640 (1991). It does not "fairly appear", however, that the dismissal was based upon or interwoven with federal law. Thus, federal review of Hansbrough's claim is barred, absent a showing of cause and prejudice, if the state applied its well established and regularly followed procedural rules to dismiss the appeal.

Discussion

[3, 4] There is no Alabama rule or law that a voluntary dismissal of an appeal is with prejudice so as to bar a subsequent appeal. Likewise, there is no Alabama case holding that post-trial motions have no tolling effect if a notice of appeal has already been filed when the motions are denied.

In this case, Hansbrough had made clear in the trial court and on appeal that he intended to proceed pro se. The trial court nonetheless appointed counsel. When Hansbrough became aware of that, he undertook action to correct the situation. The question is not whether Hansbrough was well advised to proceed without counsel, or whether there was some other way to effect removal of this undesired counsel. The question is whether his action transgressed a firmly established and regularly followed state procedural rule.

[5, 6] In Ford v. Georgia, 498 U.S. 411, 423, 111 S.Ct. 850, 587, 112 L.Ed.2d 935 (1991), the Supreme Court followed James v. Kentucky, 466 U.S. 341, 348-51, 104 S.Ct. 1830, 1035-36, 80 L.Ed.2d 346 (1984), in holding "that only a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." Novel procedural requirements or those of whose existence the

defendant could not reasonably deemed to have been apprised, cannot be permitted to thwart review of cases seeking vindication in state courts of federal constitutional rights. See NAACP v. Alabama, ex rel. Flowers, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964); Wright v. Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963); Spencer v. Kemp, 781 F.2d 1458, 1463, 1469-71 (11th Cir. 1986) (en banc).

[7, 8] We find nothing in Alabama's appellate or criminal rules which could reasonably be construed as apprising Hansbrough that dismissal of his orally-noticed appeal and refiling as provided by the Rule would or even might be untimely or constitute a waiver of his right to appeal. The striking of Hansbrough's notice of appeal by the Alabama Court of Criminal Appeals was not grounded on a "firmly established, regularly followed" procedural rule. In fact, Alabama has no rule at all, either providing that withdrawal of one notice of appeal acts as a bar to the second, or

providing that the filing of a second notice of appeal more than 42 days after denial of post-trial motions is untimely if a prior notice has previously been withdrawn. The fact that Hansbrough filed a notice of appeal prior to filing his post-sentencing motions does not appear to be relevant to the issues because under Ala.R.App.P. 4(b)(1), a premotion notice of appeal is treated as having been filed on the date the notice is denied.

## Conclusion

We reverse the district court's denial of Hansbrough's habeas petition on the grounds of procedural default and remand for consideration on the merits.

REVERSED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 91-7735

---

CHARLES HANSBROUGH,

Petitioner-Appellant,

versus

SHERRELL WAYNE LATTA, Jailer; ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents-Appellees.

---

On Appeal from the United States District Court
for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING
( March 14, 1994 )

BEFORE: KRAVITCH, BLACK, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing filed by appellees, Sherrell Wayne Latta and Attorney General of the State of Alabama, is denied.

ENTERED FOR THE COURT:

/s/Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| CHARLES HANSBROUGH, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. CV 90-A-695-S |
| | ) | |
| CAPTAIN LATTA, Warden; | ) | |
| ATTORNEY GENERAL OF | ) | |
| THE STATE OF ALABAMA, | ) | |
| | ) | |
| Respondents. | ) | |

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The petitioner, Charles Hansbrough, filed his pro se petition for relief under 28 U.S.C. §2254 in the above-styled cause on April 10, 1990. Although at the time of the filing of this action the petitioner was in custody at the Jefferson County Jail awaiting sentencing, he was sentenced on April 20, 1990, and transferred to the Alabama Department of Corrections thereafter. Petitioner was sentenced to 20 years in prison following his convictions for attempted theft in the first degree and possession of forgery devices after a jury trial. In accordance with the usual practices

of this court and 28 U.S.C. §636(b), the petition has been referred to the undersigned magistrate judge for a preliminary review and recommendation.

## I. Procedural Background

On March 2, 1990, petitioner and his wife both went to trial representing themselves. Although an attorney had been appointed to stand-by counsel, petitioner plainly expressed his desire to represent himself. The jury convicted him of attempted theft in the first degree and possession of forgery devices. Petitioner continued to represent himself at the time of sentencing on April 20, 1990, and at the conclusion of the sentencing hearing, he gave oral notice of his intention to appeal the conviction and sentence. From that point forward,the procedural history of this case became complex.

After giving oral notice of appeal on April 20, 1990, as authorized by Rule 3(a)(2) of the Alabama Rules of Appellate Procedure, petitioner

filed three post-conviction motions. Identified as "Motion for New Trial - A," "Motion for New Trial - B," and "Motion for Judgment of Acquittal," all filed on May 17, 1990, only the "Motion for New Trial - B" is pertinent to the issues now asserted in the instant habeas action.[2] Although the "Motion for Judgment of Acquittal" apparently was not ruled upon, both motions for new trial were denied by the trial court on May 22, 1990.

While petitioner's case was pending on direct appeal, he discovered the trial court had

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[2]Petitioner asserts also that between the time of his conviction and his sentencing, he filed motions with the Alabama Court of Criminal Appeals seeking to stay proceedings in his case and seeking relief in the nature of a writ of habeas corpus. He argues that these motions also presented to that court the same issues now before this Court. The motion to stay proceedings was denied on March 21, 1990, and the state petition for writ of habeas corpus to the Alabama Court of Criminal Appeals was denied on March 28, 1990. Compare Castille v. Peoples, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989).

appointed his stand-by counsel to represent him on appeal. Not wanting to be represented by counsel and wishing to pursue his appeal pro se, he filed a motion to withdraw his oral notice of appeal on June 8, 1990. Thereafter, on June 15, 1990, the Alabama Court of Criminal Appeals dismissed the appeal "on motion by appellant...." Thirteen days later, on June 28, 1990, petitioner filed his written "Pro Se Notice of Appeal." In that notice, petitioner expressly stated that he had withdrawn his oral notice of appeal because an attorney was erroneously listed as his counsel of record on appeal. Furthermore, petitioner stated that he wanted to appeal from the court's judgment of conviction on March 2, 1990, the denial of his motions for new trial on May 22, 1990, and other motions set out in the notice. On July 18, 1990, however, the Alabama Court of Criminal Appeals entered an order that "said appeal be and stand stricken in this court and in the court below."

On August 27, 1990, once again the petitioner filed a "Pro Se Notice of Appeal" purporting to appeal from the judgment of conviction, the sentencing order, and the denial of his Motion for Judgment of Acquittal. But, once again, on November 2, 1990, the Alabama Court of Criminal Appeals entered an order dismissing the appeal "as untimely filed."

Following the filing of the petition for habeas corpus in this court, an order was entered on May 18, 1990, requiring the respondents to show cause why the relief should not be granted. Their response was filed on June 11, 1990. On October 5, 1990, the court entered an order requiring all parties to expand the record to address the effect of the petitioner's withdrawal of his original notice of appeal in state court. The court noted that such a withdrawal might be deemed to be a deliberate by-pass under Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Petitioner responded on October 24, 1990, as did the respondents on October 29, 1990. The court

entered yet another order on January 7, 1991, once again requesting the respondents to further expand the record in this cause and directing the petitioner to show cause why the habeas relief should not be denied because of an apparent deliberate by-pass or procedural default. The respondents expanded the record as directed, and the petitioner responded to the show cause order on February 11, 1991.

## II. Procedural Default

The interesting issue presented by this case is whether the petitioner's voluntary withdrawal of his oral notice of appeal constituted a procedural default precluding federal habeas review on the merits of the claims asserted in this action. While the voluntary dismissal of an appeal originally raised concerns about deliberate by-pass under Fay v. Noia, subsequent Supreme Court decisions now appear to make clear that the deliberate by-pass standard has yielded to the procedural default test announced in Wainwright v. Sykes,

433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). See Coleman v. Thompson, ___ U.S. ___, 1991 WESTLAW 107399 (Supreme Court No. 89-7662, June 24, 1991). Based on the facts described above, the court concludes that petitioner has procedurally defaulted these claims and that he has failed to show "cause and prejudice" excusing the procedural default.

The doctrine of procedural default rests upon the long-recognized legal theory that a state criminal conviction should not be disturbed because of alleged federal constitutional errors where there is an independent and adequate state ground upon which the validity of the conviction rests. See Coleman v. Thompson, supra. Thus, the rule stated in Coleman is as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider

> the claims will result in fundamental miscarriage of justice.

Coleman v. Thompson, ___ U.S. ___, ___, 1991 WESTLAW 107399, at p. 17. Hence, the threshold questions presented here are whether the petitioner has defaulted his federal claims and, if so, has he done so on the basis of an independent and adequate state procedural rule.

As outlined above, the critical facts reveal that at the time of the petitioner's sentencing on April 20, 1990, he gave oral notice of appeal as authorized by Rule 3(a)(2) of the Alabama Rules of Appellate Procedure.[3]

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[3] In pertinent part, Alabama Rule 3(a)(2) reads as follows:

> In criminal cases, an appeal permitted by law as a matter of right to an appellate court shall be taken by the filing of a written notice of appeal with the Clerk of the trial court within the time allowed by Rule 4, or by the defendant's giving an oral notice of appeal at the time of sentencing, which oral notice shall be noted of record;....

Thus, immediately as of the time of sentencing, petitioner had an active pending appeal to the Alabama Court of Criminal Appeals. Within 30 days after the date of sentencing, on May 17, 1990, petitioner filed his post-trial motions for new trial and a motion for judgment of acquittal. Only the "Motion for New Trial - B" is pertinent to the instant habeas case because it is in that motion that the issues now before this court were first raised before the state court. On May 22, 1990, both motions for new trial were denied. There is no indication in the court file that the motion for judgment of acquittal was ever affirmatively ruled upon by the state court.

After learning that his stand-by counsel had been appointed to represent him on appeal, petitioner filed a notice to withdraw his oral notice of appeal. That oral notice of withdrawal was filed on June 8, 1990, <u>after</u> the "Motion for New Trial - B" had been denied by the trial court. Apparently on the basis of the notice of withdrawal, the Alabama Court of

Criminal Appeals dismissed the appeal on the petitioner's motion on June 15, 1990. Thus, as of that date, there was no pending appeal nor was there a pending post-trial motion dealing with the issues now before this court.

Alabama Rule of Appellate Procedure 42 is virtually the same as the comparable federal appellate rule. The Alabama rule reads, in part as follows:

> An appeal or other proceeding may be dismissed on motion of the appellant or moving party upon such terms as fixed by the court. A copy of the dismissal of the appeal shall be filed by the Clerk of the appellate court with the Clerk of the court below.

See Alabama Rule of Appellate Procedure 42. The order dismissing the appeal on petitioner's motion, however, did not specify whether the dismissal was with or without prejudice to the petitioner's right to file subsequent appeals.

On June 27, 1990, the petitioner filed his written notice of appeal, purporting to appeal from the court's order of conviction on March 2, 1990, and the denial of post-trial motions on May 22, 1990. Petitioner asserts that this

notice of appeal was timely inasmuch as it came within 42 days after the denial of his post-trial motions. He cites Alabama Appellate Rule 4(b)(1) for the authority that:

> If a motion in arrest of judgment, motion for a new trial, or motion for judgment of acquittal has been filed within 30 days from the pronouncement of sentence, an appeal may be taken within 42 days (6 weeks) after the denial of overruling of the motion.

Hence, petitioner argues that he had the right to file a second notice of appeal within 42 days after the denial of his post-trial motions even if his earlier oral notice of appeal had been withdrawn and that appeal dismissed.

The action of the Alabama Court of Criminal Appeals on June 15, 1990, however, is contrary to that supposition. On that date, the court struck the appeal, apparently on its own motion, although it did not state the reason for its conclusion that the appeal was insufficient. It is not clear whether the court viewed the second appeal as being barred by the dismissal of the first or as being untimely, either is a

possibility.[4] In either event it is apparent

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[4]Although there appears to be no Alabama authority on the point, several courts have held that the dismissal of an appeal acts as a bar to subsequent appeals. See generally 5 Am. Jur. 2d Appeal & Error §930, p. 358; Annotation, 96 A.L.R.2d 312 (1964); Annotation, 42 A.L.R. Fed. 758 (1979). Under application of this rule, petitioner's dismissal of his first appeal precluded him from filing another, even if timely.

It is also possible that, contrary to petitioner's argument, his second notice of appeal may have been untimely. Once again, there is no Alabama case law on point, but the phrasing of Ala.R.App.P. 4(b)(1) indicates the tolling effect of post-trial motions on the time for filing an appeal in a criminal case may depend on whether notice of appeal was given before or after the filing of the motions. For instance, the fifth sentence of Ala.R.App.P. 4(b)(1) reads:

> When notice of appeal is made or filed before the timely filing of a motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal, ..., the time for filing of the court reporter's transcript and the clerk's record shall be governed by Rule 11(b) and (c) as if the notice of appeal had been filed on the date of the overruling of such motion. [Emphasis added].

While this does not speak directly to the tolling effect on the time for filing an appeal,

(Footnote Continued)

that the Alabama Court of Criminal Appeals viewed the written notice of appeal filed June 278, 1990, to be insufficient to invoke its appellate jurisdiction to review the merits of the petitioner's appeal.

The combination of the petitioner's dismissal of his first appeal and the striking of his second appeal constitute an independent and adequate state ground precluding consideration of the merits of the habeas claims now before the court. Even though the Alabama Court of Criminal Appeals did not state the

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(Footnote Continued)
it does indicate the intent that notices of appeal filed before the filing of post-trial motions, not 42 days after that date. Thus, post-trial motions have no tolling effect if a notice of appeal already has been filed when the motions are denied. Under the facts of this case, therefore, petitioner's oral notice of appeal, given before the filing of post-trial motions, was deemed "filed" on the date the motions were overruled, May 22, 1990, and the post-trial motions had no tolling effect. When petitioner dismissed his oral notice of appeal, that appeal was lost. The written notice filed June 27, 1990, was untimely because it was more than 42 days after sentencing and it could not benefit from tolling.

reason for striking the written notice of appeal, it is apparent that the reason did not involve any consideration of the habeas claims now before the court. Petitioner defaulted by dismissing his valid, pending appeal, thereby causing his second notice of appeal to be stricken either because it was barred by the earlier dismissal or because it was untimely. Plainly, the Alabama Court of Criminal Appeals refused to consider petitioner's appeal on the merits because the second notice of appeal invoking their appellate jurisdiction was legally inadequate to do so. The petitioner's failure to prosecute his appeal in a timely and proper manner is an independent and adequate state basis for precluding consideration of the merits of the appellate claims in this habeas action.

In order to avoid the procedural default doctrine of Wainwright v. Sykes, supra, the petitioner must show cause for his procedural default and actual prejudice from the alleged constitutional error. See Wainwright v. Sykes,

supra; Coleman v. Thompson, supra. Because the petitioner represented himself in connection with these appeals, he cannot claim constitutionally ineffective assistance of counsel as cause for the procedural default. Moreover, "cause" in the context of procedural default requires "a showing of some external impediment preventing counsel [or petitioner] from constructing or raising the claim." This means that "cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded... efforts to comply with the state's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397, 408 (1986); see Pitts v. Cook, 923 F.2d 1568 (11th Cir. 1991). Despite notice from the court explaining the necessity of establishing cause and prejudice, petitioner has not shown any such external impediment that caused him to forfeit his direct appeal on these claims. Indeed, it is apparent from the record that the only cause for the loss of the appeal was the

petitioner's own errors. Being not able to show cause for his procedural default, the merits of the petitioner's claims cannot be reviewed by this court.

Finally, application of the procedural default doctrine precluding review of the merits in this case does not result in a fundamental miscarriage of justice. The "miscarriage of justice" test is a narrow exception to the procedural default rule, acting as a "safety valve" for the "'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." Harris v. Reed, 489 U.S. 255, 271, 109 S.Ct. 1038, 103 L.Ed.2d 308, 323 (1989) (O'Connor concurring). Here, petitioner has made no showing, substantial or otherwise, of factual innocence that would bring him within the "safety valve" of this exception to the procedural default rule.

Having concluded that the petitioner procedurally defaulted the claims now before the court by dismissing an appeal in which they were

included and having determined that he has not shown cause for his failure to properly prosecute the appeal of these claims, this court is precluded from considering the merits of the claims under the procedural default doctrine of Wainwright v. Sykes. Moreover, the "fundamental miscarriage of justice" exception to the rule does not apply. All of that said, no habeas relief is available to the petitioner.

Based upon the foregoing considerations, the magistrate judge RECOMMENDS that the petition for habeas corpus relief pursuant to 28 U.S.C. §2254 in the above-styled cause be DENIED and DISMISSED.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal.

The Clerk is DIRECTED to serve a copy of this report and recommendation upon the petitioner and upon counsel for the respondents.

DATED this 25th day of July, 1991.

/s/T. Michael Putnam
T. MICHAEL PUTNAM
UNITED STATES MAGISTRATE
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| CHARLES HANSBROUGH, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. CV 90-A-695-S |
| | ) | |
| CAPTAIN LATTA, Warden; | ) | |
| ATTORNEY GENERAL OF | ) | |
| THE STATE OF ALABAMA, | ) | |
| | ) | |
| Respondents. | ) | |

O R D E R

The magistrate judge filed his report and recommendation in this cause on July 26, 1991, recommending that the petition for habeas corpus relief under 28 U.S.C. §2254 be denied. The petitioner filed his objections to the report and recommendation on August 9, 1991. Having now carefully reviewed and considered de novo all the materials in the court file, including the report and recommendation and the objections to it, the court is of the opinion that the report and recommendation is due to be and hereby is ACCEPTED and ADOPTED.

Accordingly, the petition for writ of habeas corpus under 28 U.S.C. §2254 in the

above-styled cause is due to be and the same is hereby DENIED and DISMISSED WITH PREJUDICE.

DATED this 12 day of September, 1991.

/s/
SENIOR JUDGE

## APPENDIX "C"

## RULE 42.

### Voluntary dismissal.

If the parties to an appeal or other proceedings shall sign and file with the clerk of the appellate court an agreement that the proceeding be dismissed, specifying the terms as to payment of costs and fees, if any, due in connection with the appeal, the court may order a case dismissed. An appeal or other proceeding may be dismissed on motion of the appellant or moving party upon such terms as fixed by the court. A copy of the dismissal of the appeal shall be filed by the clerk of the appellate court with the clerk of the court below.

APPENDIX "D"

"(b) Appeals in criminal cases.

(1) CIRCUIT COURT. In a criminal case a notice of appeal by the defendant shall be filed with the clerk of the trial court within 42 days (six weeks) after pronouncement of the sentence, provided that the notice of appeal may be oral, as provided in Rule 3(a)(2). A notice of appeal filed after the announcement of a decision or order, but before pronouncement of the sentence, shall be treated as having been filed after pronouncement of the sentence and on the day thereof. If a motion in arrest of judgment, motion for a new trial, or motion for judgment of acquittal has been filed within 30 days from pronouncement of the sentence, an appeal may be taken within 42 days (six weeks) after the denial or overruling of the motion. A motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal filed before pronouncement of the sentence shall be treated as having been filed immediately after

pronouncement of the sentence and on the day thereof. When notice of appeal is made or filed before the timely filing of a motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal, or during the pendency of such a timely filed motion, the time for filing of the court reporter's transcript and the clerk's record shall be governed by Rule 11(b) and (c) as if the notice of appeal has been filed on the date of the overruling of such motion. When an appeal by the state as of right is authorized by statute or rule, the notice of appeal shall be filed in the trial court within 42 days (six weeks) after the decision, order, or judgment appealed from; except that any pretrial appeal by the state shall be taken within the time allowed by the rule of criminal procedure providing for such appeals. See Form 12."

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Supreme Court, U.S.
FILED
JUN 17 1994
OFFICE OF THE CLERK

(3)

NO. 93-2021

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

STATE OF ALABAMA,

PETITIONER - APPELLEE,

VS.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELVENTH CIRCUIT

[PROCEEDING UNDER 28 U.S.C. §2254]

## BRIEF IN OPPOSITION

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(205) 328-2606

## QUESTION PRESENTED FOR REVIEW

Respondent Hansbrough disagrees with the Petitioners' statement of the issues in this case.

The issue is whether Petitioner State of Alabama dismissed Respondent Hansbrough's direct appeal of his state conviction on the basis of a firmly established, regularly followed, independent and adequate state procedural rule, thereby precluding habeas review on the ground of procedural default. At the threshold of that issue is the question of whether Respondent's dismissal of his oral notice of appeal in order to proceed pro se acted as a bar to his subsequent notice of appeal, filed within forty-two days after denial of his timely-filed post-trial motions, as provided by Alabama Rules of Appellate Procedure Rule 4(b)(1).

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## OPINIONS BELOW

The opinion of the Eleventh Circuit is published as Hansbrough v. Latta, 11 F.3d 143 (11th Cir. 1994).

## STATEMENT OF PROCEEDINGS BELOW

Although substantially in agreement with the procedural history quoted by Petitioners from the Magistrate Judge's Report and Recommendation (Petition, pages 3-5), Respondent disagrees with Petitioner's further statement to the effect that the Eleventh Circuit "affirm[ed] the district court's finding that Respondent had committed a procedural default" and reversed in spite of it. (Petition, pages 5-6.) The Eleventh Circuit "revers[ed] the district court's denial of Hansbrough's habeas petition on the grounds of procedural default and remand[ed] for consideration on the merits". (Hansbrough, supra at 147. Following is an outline of the events pertinent herein:

### Alabama Courts

3/2/90 Jury trial, Jefferson County, Alabama, Circuit Court; guilty verdict.

4/20/90 Sentence Hearing and oral notice of appeal.

5/17/90 Post-trial Motions, including Motion for New Trial-B (which presents federal claims).

5/22/90 Denial of Motions for New Trial A & B (R-14)

6/8/90 Notice of Withdrawal of (Oral) Notice of Appeal (R-14)

6/15/90 Alabama Court of Criminal Appeals' Certificate of Dismissal on Motion of Appellant. (R-14)

7/6/90 Court of Criminal Appeals' Certificate of Pro Se Notice of Appeal filed 6/28/90, pursuant to denial of Motions and noting that previous (oral) notice had been withdrawn because unwanted counsel was appointed. (R-14)

7/18/90 CCA Certificate of Appeal Stricken (R-14).

Federal Courts

7/25/91 Magistrate Judge's Report & Recommendation. (R-15)

9/12/91 District Court's Order adopting R and R. (R-30)

9/17/91 Notice of Appeal. (R-29)

9/27/91 District Court's denial of Motion for Certificate of Probable Cause and Leave to appeal In Forma Pauperis. (R-29).

6/19/92 Eleventh Circuit's grant of application for Certificate and leave to proceed in forma pauperis.

4/13/93 Following submission of briefs by both parties, undersigned counsel appointed to file supplemental brief.

9/22/93 Oral argument to Eleventh Circuit.

1/7/94 Eleventh Circuit reversed district court.

1/28/94-2/25/94 Appellees' (Petitioners') Brief in excess of page limits, corrected Brief filed with Motion to allow out of time; granted.

3/14/94 Petition for Rehearing denied.

3/22/94 January 7 opinion issued as mandate.

(Because there was no hearing on the merits, the statement of the case encompasses the statement of facts.)

## SUMMARY OF THE ARGUMENT IN OPPOSITION

The time and manner of perfecting an appeal from a state law conviction are generally matters of state law. A state court cannot, however, thwart review of its actions through the imposition of novel, unprecedented or undisclosed procedural requirements. The Eleventh Circuit correctly determined in the case below that Alabama had no rule which could reasonably be construed as apprising Hansbrough that his actions with regard to his direct appeal in state court might be deemed untimely, or a waiver of his constitutional right to appeal. To the contrary, the plain language of the applicable Alabama rule provided for precisely the procedure he followed.

Respondent's actions did not transgress a "firmly established and regularly followed state procedural rule", thus there is no procedural default precluding habeas review and Hansbrough is entitled to consideration on the merits in federal court.

Petitioners have failed to show any conflict between the Eleventh Circuit opinion and a holding of another circuit, the Alabama Supreme Court, or this Court, nor is there any showing that the Eleventh Circuit departed from the accepted and usual course of judicial proceedings in a manner requiring the exercise of this Court's supervision. The holding below being entirely consistent with Harris v. Reed[1] and other opinions of this Court with respect to procedural default, the instant case presents no important question of federal law in need of resolution. Accordingly, the Petition for Writ of Certiorari should be denied.

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[1]489 U.S.255 (1989).

## ARGUMENT

Petitioners have miscast the issue, the situation and the appellate holding in this case. Petitioners persist in referencing Respondent's filing of a second notice of appeal as an effort to reinstate a withdrawn appeal (See, e.g., Petition at 7, 8, 12, 13, 14, 15, 16). These loose characterizations blur or gloss over the fact that a second, distinct notice was filed pursuant to the provisions of A.R.A.P. Rule 4(b)(1), and seem to suggest that, having withdrawn the only notice of appeal to which he was entitled, Respondent then sought to "reinstate" it. That misses the point of the case and misrepresents the state of the procedural law in Alabama. Review is purportedly sought on the ground that "this Court has never decided whether a criminal defendant, who gives a valid notice of appeal within the time allotted by state law, and then voluntarily withdraws the notice of appeal, is constitutionally entitled to have his notice of appeal reinstated." (Petition at 13, emphasis added.)

The issue, rather, is whether his withdrawal of the oral notice of appeal, for reasons consistent with his prior position regarding representation by counsel, barred the Respondent from filing a subsequent notice of appeal as provided by state rules, absent clear law or rule to the contrary.

The Eleventh Circuit ruling and Respondent's position are entirely consistent with Coleman v. Thompson, 501 U.S. 722 (1991), and Brown v. Allen, 344 U.S. 443 (1953), cited by Petitioners. Coleman and Brown were both cases in which counsel for convicted defendants failed to meet clearly stated filing deadlines. The

circumstances in the instant case are quite different. Here, Hansbrough filed an oral notice at the time of sentencing, as permitted by state rules. He also timely filed several post-trial motions, one of which (Motion B) asserted federal claims. Consistent with his position at trial, he expressed a desire to proceed pro se on appeal; despite his repeated requests in this regard, the same counsel to whom Respondent objected at trial was appointed to represent him on appeal. When he discovered that, he withdrew his oral notice of appeal, but filed a written Notice of Appeal more than forty-two days from conviction but well within forty-two days from denial of his post-trial motions, as provided by Alabama Rules of Appellate Procedure, Rule 4(b)(1).

Had Hansbrough filed his written notice forty-three days after denial of his post-trial motion, rather than forty-two days as provided in the rule, his appeal would unquestionably be untimely, and timely notice is jurisdictional in Alabama. In such event, Hansbrough, like Coleman and Brown, would indeed have procedurally defaulted, and, absent a showing of cause and prejudice, would be precluded from habeas review. Indeed, because the errors in the two cases cited were occasioned by counsel, those defendants sought to be excused from the effects of the state rules.

Hansbrough, though, does not seek to be excused from default; unlike the situation in Coleman and Brown, there is no default to excuse, because the Alabama Court of Criminal Appeals' action in dismissing Respondent's appeal was not grounded on an adequate and independent state rule. Coleman v. Thompson, supra; Ford v. Georgia, 498 U.S. 411 (1991); Harris v. Reed, supra. As the

Eleventh Circuit found, and Petitioners have not shown otherwise, no such rule exists. Rather, Hansbrough proceeded under A.R.A.P. Rule 4(b)(1), which provides, in pertinent part:

> Rule 4. Appeal As of Right - When Taken
> (b) Appeals in Criminal Cases.
> (1) Circuit Court. In a criminal case a notice of appeal by the defendant shall be filed with the clerk of the trial court within 42 days (6 weeks) after pronouncement of the sentence, provided that the notice of appeal may be oral, as provided in Rule 3(a)(2)... If a motion in arrest of judgment, motion for new trial, or motion for judgment of acquittal has been filed within 30 days from pronouncement of the sentence, an appeal may be taken within 42 days (6 weeks) after the denial or overruling of the motion.... (Emphasis added.)

A.R.A.P. Rule 42, which provides for voluntary dismissals, says nothing whatever about whether such a dismissal is with or without prejudice. The Court of Criminal Appeals' summary dismissal was also silent on that point.

Petitioners have shown no rule or case holding or even hinting that voluntary dismissal of a notice of appeal in Alabama constitutes a bar to a subsequent appeal filed within the time provided by Rule 4(b)(1). There is a dearth of case law. The few Alabama cases are civil actions, and certainly are not on all fours. They indicate, though, that where an appeal has never been considered on the merits, the effect of a dismissal is the same as if no appeal had been taken, and if the second notice is given within the time allowed there is no valid reason why the new appeal should not be considered. Federal Deposit Insurance Corp. v. Equitable Life Assurance Society of the United States, 289 Ala. 192, 266 So.2d 752 (1972); Wilson v. Wilson, 298 So. 2d 616, 53 Ala. App. 194, cert. denied, 298 So. 2d 622, 292 Ala. 759 (1973). Taken with the plain, unambiguous language of the rule, the cases

flatly contradict Petitioners' position. (We note that the Petitioners have themselves referred to the first notice of appeal as "void ab initio". See, e.g., Appellees' Brief to Eleventh Circuit at page 13.) The action of the Court of Criminal Appeals was completely without precedent, as well as contradictory to the plain language of Rule 4(b)(1). A requirement of which Respondent could not reasonably be deemed to have been apprised cannot deprive him of his constitutionally guaranteed right to a direct appeal. Coleman, supra; Ford, supra; Harris, supra; Naacp v. Alabama ex. rel. Flowers, 377 U.S. 288 (1963).

For the first time in the more than three years of this litigation, Petitioners accuse Hansbrough of withdrawing his oral notice for "devious, tactical reasons" and suggest that his desire to represent himself is a "factor that should weigh against him..." (Petition, pages 8, 12.) There was nothing devious about Respondent's motive; as stated by Petitioners (and never disputed) it was to avoid representation by unwanted counsel. (Petition at 12.) While the wisdom or otherwise of Hansbrough's rejection of representation by an experienced and well-regarded attorney could be debated, it was not devious. Petitioners do not clarify what tactical advantage non-representation might have conferred upon Respondent, or why or in what manner his desire should weigh against him. In any event, Hansbrough's actions were consistent from an early point in the state court trial process, and, wise or not, he did have the right to proceed without counsel.

Finally, Petitioners insist that the holding of the Eleventh Circuit is inconsistent with this Court's prior rulings "which

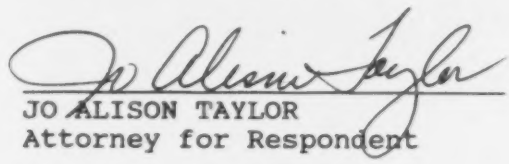
clearly require that a state court's application of a procedural rule be inconsistently applied [sic] before a federal habeas court can disregard the procedural default and entertain habeas claims". (Petition at 10.) That statement of this Court's prior rulings is inaccurate in its incompleteness, and by implication also distorts the situation and the issue. In any event, neither the Alabama Court of Criminal Appeals nor Petitioners have cited any rule at all, consistently applied or otherwise, to support its contentions. Rule 4(b)(1) expressly provided for exactly the procedure Respondent followed. Thus, there is no preclusive procedural default to "disregard". We also note that in the same paragraph in which Petitioners contend the Eleventh Circuit erred in finding the state court's ruling "novel" and "arbitrary" is found the statement that the Alabama Court of Criminal Appeals "[n]ever had to make this ruling in any other case". (Petition at 10.)

## CONCLUSION

The Eleventh Circuit correctly applied Coleman v. Thompson, supra, Ford v. Georgia, supra, and Harris v. Reed, supra, to the case at bar. There was nothing in Alabama's appellate or criminal rules that could reasonably have apprised Respondent that withdrawing his oral notice of appeal for clearly-expressed reasons valid to him, and filing a written notice within forty-two days of the denial of his post-trial motions, might be deemed untimely or constitute a waiver of his right to appeal. Pursuant to this Court's directives on the issue of procedural default, there was no preclusive procedural default in this case and Hansbrough is entitled to consideration on the merits in the federal courts.

The Petition for Writ of Certiorari fails to meet any of the criteria for consideration by this Court. The decision below was appropriate and correct and the Petition is due to be denied.

Respectfully submitted,



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93-2021

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June 17, 1994

Honorable William Suter, Clerk
United States Supreme Court
One First Street, NE
Washington, D.C. 20543

Re: State of Alabama vs. Charles Hansbrough
No. _____

Dear Mr. Suter:

Enclosed please find the original of my Brief in Opposition to Petition for Certiorari to the Eleventh Circuit Court of Appeals, together with my Certificate of Service therefor, and a Motion to Proceed in Forma Pauperis. It is my understanding that the one copy suffices when filed on behalf of an indigent. As indicated in my Motion, I was appointed under the C.J.A. by the Court of Appeals to represent Mr. Hansbrough.

Please let me know if anything further or different in required in this connection.

Very truly yours,

Jo Alison Taylor

JAT/gc

Copy: Hon. James B. Prude
Mr. Charles Hansbrough

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JUN 20 1994
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SUPREME COURT, U.S.

Supreme Court, U.S
FILED
JUL 19 1994
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(4)

NO. 93-2021

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALABAMA,

PETITIONER - APPELLEE,

V.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[28 U.S.C. §2254 PROCEEDINGS]

# REPLY BRIEF TO THE BRIEF IN OPPOSITION

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## ARGUMENT IN REPLY TO BRIEF IN OPPOSITION

In its Brief in Opposition to the Petition for Writ of Certiorari, Respondent accuses the Petitioner of miscasting the issue and appellate holdings in this case. Respondent asserts that he attempted to give a second, distinct notice of appeal after the first appeal had been withdrawn, rather than attempting to "reinstate" his first appeal. Respondent asserts that the Petitioner misrepresents the state of procedural law in Alabama.

Respondent's brief underscores the difficulty of the issue involved in this case and why this issue should be heard. Under Alabama law, there is no procedural rule allowing a defendant to give a "second" notice of appeal after he has

voluntarily withdrawn his first notice of appeal. The question of whether he can give a "second" notice is simply a state law question which would not be reviewable in federal habeas corpus. Consequently, if any review on this case is to be given by this Court, the issue must involve a federal constitutional question.

The federal constitutional question presented in this petition is whether Respondent, as part of his due process rights, has a federal constitutional right to "re-instate" his voluntarily withdrawn notice of appeal. If there is no federal right to reinstate the appeal, then clearly he would not be entitled to federal habeas corpus relief simply because the State, acting under its own internal procedures, did not accept the

second notice of appeal after he had voluntarily withdrawn the first notice.

Respondent's own Brief in Opposition implicitly acknowledges that the question of whether a subsequent notice of appeal can be entered is a question of state law. It states:

> "The issue, rather, is whether his withdrawal of the oral notice of appeal, for reasons consistent with his prior position regarding representation by counsel, barred the Respondent from filing a subsequent notice of appeal as provided by state rules, absent clear law or rule to the contrary."
>
> [Brief in Opposition, pg. 4)

In no way does Respondent ever assert that he had a federal constitutional right to give a second notice of appeal or a right to reinstate his first notice.

Respondent carefully avoids asserting that he had a federal constitutional right

to give a second notice. However, he states that the State's refusal to accept the second notice was properly reversed in federal habeas because the "Alabama Court of Criminal Appeals' action in dismissing Respondent's appeal was not grounded on an adequate and independent state rule" [Respondent's Brief in Opposition, page 5]. Clearly, this assertion is erroneous because Respondent's motion to dismiss his appeal was dismissed by the Alabama Court pursuant to Rule 42, Alabama Rules of Appellate Procedure (See Appendix "C", Appendices to the Petition for Writ of Certiorari, page 36). There is no doubt that the state court followed its appellate rules in dismissing the appeal.

Respondent also asserts that Rule 42 which allows a voluntary dismissal of an appeal is silent on whether such a

dismissal is with or without prejudice. Petitioner agree that that proposition. However, whether the state court construes a voluntary dismissal to be one of prejudice is merely a state law question and the Respondent is not entitled to any federal habeas corpus review, let alone relief, on the question of whether the state court, acting under state law, correctly refused his second notice or refused a reinstatement of the first notice.

Respondent contends that Alabama does not have any appellate rule or case holding that a voluntary dismissal of a notice of appeal constitutes a bar to a subsequent appeal. While this is a correct statement, it ignores the fact that the Alabama Court of Criminal Appeals construes it to be a bar to a subsequent

appeal because it denied Respondent the right to give a subsequent notice of appeal. This is simply a state law question.

Respondent asserts that Alabama law does allow, in civil cases, a plaintiff to dismiss an appeal and then revive the appeal by giving a second notice within the time allowed by law, citing Federal Deposit Insurance Corp. v. Equitable Life Assurance Society of the United States, 289 Ala. 192, 266 So.2d 752 (1972), and Wilson v. Wilson, 298 So.2d 616, 53 Ala. App. 194 (1973). These cases are inapplicable to Respondent's case for two reasons: first, these cases were decided prior to the adoption of the Alabama Rules of Appellate Procedure, which became effective in 1975. The Rules do not

contain the right to bring a subsequent appeal.

Secondly, these cases allowed a subsequent appeal only because a valid notice of appeal was in effect when the subsequent appeal was brought and because the appeal had been dismissed by the Court for other reasons, not on a motion by the plaintiff.

In Respondent's case, his "second" notice of appeal was not timely because it was filed more than 42 days from the date of sentencing in violation of Rule 4(b)(1), Alabama Rules of Appellate Procedure. [Exhibit D, Appendices to the Petition, pages 37, 38]. The Alabama Court of Criminal Appeals' order stated that the second notice of appeal was "untimely". Furthermore, no notice of appeal was in effect at the time he sought

to enter his second notice because the first notice had been withdrawn. Thus, Respondent has no basis for his assertion that his subsequent notice of appeal was proper under Wilson.

Respondent is also mistaken in his claim that his second notice of appeal was timely because it was filed within forty-two (42) days form the date of the denial of his motion for a new trial. However, as the District Court held, the proper calculation for notice under the facts of this case, was forty-two (42) days from the date of sentencing. Hence, this second notice was long past the required 42 day limit, and therefore, untimely.

Respondent also asserts that the Court of Criminal Appeals' action in declining to accept the second or

subsequent notice of appeal was "completely without precedent" [Brief in Opposition, page 7]. There is nothing in the record or evidence to support this claim. Respondent failed to present, in any way, evidence that the Court of Criminal Appeals has allowed other defendants to dismiss an appeal and to either enter a second appeal or reinstate the dismissed appeal. One of the primary basis for this Writ of Certiorari asserted in the Petition is that the Eleventh Circuit erred in granting relief under the "firmly established and regularly followed requirement" of Ford v. Georgia, 498 U.S. 411 (1991), in that the Eleventh Circuit never found that the Alabama Court of Criminal Appeals allowed subsequent appeals in some cases and denied them in others. In fact, the Eleventh Circuit

could never have found such a fact because there is no evidence that the Alabama Court ever accepts "untimely" appeals such as Respondent's, since the time for filing a notice of appeal is jurisdictional. Patterson v. State, 549 So.2d 635 (Ala. Cr. App. 1989).

Respondents asserts that his dismissal of his appeal was not for tactical reasons but was simply done to avoid representation by unwanted counsel. [Brief in Opposition, page 7] However, this objective could have been achieved through less drastic measures. Respondent could simply have filed a motion to dismiss counsel and have counsel move to withdraw. In addition, Respondent could have filed a supplemental pro se brief on appeal if he had been disappointed with appointed counsel's brief. Contrary to

Respondent's assertion, Petitioner does not challenge the wisdom of his motion to withdraw the appeal; rather, Petitioner only asserts that by the withdrawal, he ran afoul of the state's appellate practice which did not allow subsequent notices of appeal.

Respondent contends that the state appellate rule did not apprise him that he could not enter a second appeal. The converse is also true. There is nothing in the Rule which led him to believe that he could file the subsequent notices.

In his concluding paragraph of his Opposition Brief, Respondent acknowledges the very reason why certiorari needs to be granted in this case:

> "In any event, neither the Alabama Court of Criminal Appeals nor Petitioners have cited any rule at all, consistently applied or

> otherwise, to support its contention."
>
> [Opposition Brief, pg. 8)

Since there is no "written" appellate rule or case decision, Respondent is not entitled to relief on the ground that the Alabama Court of Criminal Appeals denied him equal right or due process because it refused to accept a subsequent appeal. Furthermore, since the refusal to grant subsequent appeals is an "unwritten" rule, Respondent was not entitled to any relief under Ford v. Georgia, because he did not show that this rule was being "inconsistently applied" to allow other defendants to give subsequent notices while denying him the right to do so.

## CONCLUSION

This Petition for Writ of Certiorari presents a substantial issue for review because the resolution will fundamentally affect the right of all States to enforce procedural rules regarding the appellate process. If the Eleventh Circuit's judgement is allowed to stand, criminal defendants will have the ability to wreck havoc on the appellate process which would affect the State's ability to obtain finality of a conviction. Merely by giving a valid notice of appeal, a defendant would have an unrestricted right to dismiss and reinstate his appeal at his discretion, prolonging the length of the appellate process, which in turn would affect the ability of the State to retry him should the conviction be overturned on appeal. The ability of the State to

obtain finality through an orderly appellate process is central to its ability to punish criminal behavior.

Respectfully submitted,

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ATTORNEY GENERAL
BY-

James B. Prude

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ASSISTANT ATTORNEY GENERAL

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Supreme Court, U.S.
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NO. 93-2021

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALABAMA,

PETITIONER - APPELLEE,

V.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

# SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

[28 U.S.C. §2254 PROCEEDINGS]

REPLY BRIEF TO THE
BRIEF IN OPPOSITION

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## SUPPLEMENTAL ARGUMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

In the Brief in Support of the Petition for Writ of Certiorari, and in its Reply Brief, Petitioner stated its agreement with the Circuit Court of Appeals For the Eleventh Circuit and with Respondent that Alabama did not have any appellate rule or case authority holding that a voluntary dismissal of a notice of appeal constituted a bar to a subsequent appeal. However, since the filing of the Reply Brief, Petitioner has found Alabama case authority which in fact held that a voluntarily withdrawn notice of appeal would preclude the defendant from reinstatement of the appeal. In Lee v. State, 342 So.2d 1390 (Ala. Cr. App. 1977), the Court stated:

"It further appears that within the time provided by law that he appealed from the judgment of conviction and certificate of appeal was filed with this court.

Subsequently thereto, and before the present transcript was mailed or sent to this court, he moved the trial court to withdraw his appeal. The motion was granted, inter alia, by judgment on May 3, 1976, T. 15, Section 381, Recompiled Code 1958, authorizes this procedure.

Thereafter, on June 24, 1976, this court, as an incident to the trial court's dismissal of the appeal, dismissed the appeal, thereby terminating this court's jurisdiction.

Thereafter, on August 10, 1976, appellant, through his attorneys, filed in the circuit court his motion in writing to vacate and set aside its order granting petitioner's motion for withdrawal of appeal dated May 3, 1976, and to reinstate petitioner's notice of appeal.

The trial court, on August 13, 1976, ordered and adjudged that the motion to vacate the order of dismissal be granted and that the appeal be reinstated.

We do not know of any statutory or other authority for the trial court to reinstate the appeal as it undertook to do in this case. Dismissal of the appeal at nisi prius level is authorized by statute, supra, but a subsequent reinstatement is not authorized.

This court dismissed the appeal at the time and in the manner provided by law and so far as this court is concerned the appeal is not now pending.

The motion of the State to strike the record here filed as an incident to the dismissal appeal has merit. The record is stricken."

. . .

**CONCURRENCE**

BOOKOUT, Judge, concurring specially:

I concur in the result of this opinion, however, I do not concur with any implication that an appeal cannot be reinstated after dismissal if the reinstatement is within the time for filing an original appeal. That is, within six months pursuant to Title 15, 368, Code of Alabama 1940 in the instant

> case, or within forty-two days after judgment pursuant to Rules 3 and 4, Alabama Rules of Appellate Procedure (effective December 1, 1975).
>
> Since the attempted reinstatement in this case took place more than six months after rendition of judgment, the trial court had no jurisdiction over the appeal and neither do we.

The existence of this case authority is important to the granting of the writ because it dispels Respondent's claim that the refusal to allow him to give a subsequent notice of appeal was "completely without precedent" [Brief in Opposition, page 7], and dispels the Eleventh Circuit's holding that the refusal to accept the subsequent notice of appeal was not a "firmly established and regularly followed" state procedural rule as required by Ford v. Georgia, 498 U.S. 411 (1991).

The question presented by this Petition For Writ of Certiorari, then is not whether the State of Alabama consistently follows an established rule which disallows a subsequent appeal after a prior notice of appeal has been withdrawn because, as Lee makes clear, the State certainly does. The important question to be decided is whether the Respondent had a federal constitutional right to either reinstate his appeal or to give a second notice of appeal after he had voluntarily withdrawn his prior valid notice of appeal.

## CONCLUSION

In light of the importance of this case to the State's ability to enforce its procedural rules regarding the appellate process, Petitioner requests that the Court grant the writ and resolve the question presented herein.

Respectfully submitted,

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Supreme Court, U.S.
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NO. 93-2021

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

STATE OF ALABAMA, PETITIONER - APPELLEE

VS.

CHARLES HANSBROUGH, RESPONDENT - APPELLANT

CERTIFICATE OF SERVICE
OF BRIEF IN RESPONSE TO STATE'S SUPPLEMENTAL BRIEF

I hereby certify under penalty of perjury that I have served the accompanying Brief in Response to State's Supplemental Brief upon counsel for Petitioners by placing copies thereof in the United States Mail, first class postage prepaid, addressed, respectively, to Hon. James H. Evans, Alabama Attorney General, and James B. Prude, Alabama Assistant Attorney General, 11 South Union Street, Montgomery, Alabama 36102, and to Charles Hansbrough, 100 Warrior Lane, Bessemer, Alabama 35023, both on this 21st day of September, 1994.

The original is being filed of even date by placing same in the United States Mail, first class postage prepaid and addressed to Hon. William Suter, Clerk of the United States Supreme Court, One First Street, Washington, D.C. 20543.

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NO. 93-2021

---

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

---

ALABAMA, Petitioner - Appellee

v.

CHARLES HANSBROUGH, Respondent - Appellant

---

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

---

CERTIFICATE OF SERVICE

I, James B. Prude, a member of the Bar of this Court, hereby certify that on this 22nd day of September, 1994, three copies of the Supplemental Brief in the above-styled case were mailed, first class postage prepaid, to Honorable Jo Allison Taylor, 725 Brown Marx Tower, 2000 First Avenue, North, Birmingham, Alabama 35203, counsel for the respondent herein. I further certify that all parties required to be served have been served.

James B. Prude

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